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IN THE

Supreme Court of the United States

No. 885. 47

October Term, 1945.

GEORGE E. HICKMAN, as Administrator of the ESTATE OF NORMAN E. HICKMAN, Deceased,

Petitioner.

v.

JOHN M. TAYLOR and GEORGE H. ANDERSON, Individually and Trading as TAYLOR & ANDERSON TOWING AND LIGHTERAGE COMPANY,

and

BALTIMORE & OHIO RAILROAD CO.

JOHN M. TAYLOR, GEORGE H. ANDERSON and SAMUEL B. FORTENBAUGH, JR.,

Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

S. B. Fortenbaugh, Jr.,
B. F. Stahl, Jr.,
Shields, Clark, Brown & McCowan,
Counsel fo Respondents.

International, 236 Chestnut St., Phila. 6, Pa.

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JURISDICTIONAL QUESTION PRESENTED.

Does a Writ of Certiorari to the United States Supreme Court lie from any interlocutory decree of a Circuit Court dismissing all punitive and remedial contempt orders imposed by a District Court in a procedural controversy prior to trial on the merits?

ARGUMENT.

The Petitioner presents nothing new or immediate. He states the question and makes an appealing speech about freedom and justice with which there is no disagreement in principle. He forgets that his petition must establish jurisdiction and the necessity for immediate appellate review. His averments of lack of uniformity between Circuits and large public interest are unsupported.

The District Court had jurisdiction in its discretion prior to trial upon the merits, to order both remedial and punitive contempt. The Circuit Court had jurisdiction because the District Court issued a final punitive criminal contempt order, and, on appeal, the Circuit Court necessarily considered the remedial order involving the extent of discovery under the Federal Rules of Civil Procedure. There is now, however, no punitive order from which any appeal, writ of error or petition for certiorari lies and until the case is tried on its merits in the District Court, the question sought to be reviewed is moot. *St. Pierre v. U. S.*, 319 U. S. 41 (1943); *Doyle v. London Guarantee & Accident Co., Ltd.*, 204 U. S. 599 (1907).

Union Tool Company v. Wilson, 259 U. S. 107 (1922), is distinguished from the within case because the Circuit Court concurred in part in a final punitive criminal contempt order and directed the District Court to impose punishment on a corporate defendant previously purged of contempt; the question in the Supreme Court on certiorari was whether the Circuit Court had jurisdiction so to order. The Supreme Court held that it could and would consider the remedial part of the order simultaneously, although it could not have done so except for its joinder with the punitive order under review. On page 110, the Court said:

> "If the company (defendant and petitioner) had acquiesced in the judgment entered, Wilson, (plaintiff) having no right to initiate a review of the punitive part, could not have instituted any appellate proceeding until after final decree" (Parentheses supplied).

It is true that the Petitioner herein has sought and been denied an alleged procedural remedy to assist him in the trying of his case on the merits. But the Supreme Court cannot stop its more important work each time an interlocutory order is entered. If the District Court had not entered a punitive order of criminal contempt, the Circuit Court would have had no jurisdiction to review on plaintiff's appeal. (See *Wingert v. Kieffer et al.*, 29 F. 2d 59 (C. C. A. 4) (1928). Similarly, the defendant would have been barred from appeal to the Circuit Court from a contempt decree involving no final criminal consequences. It follows that the Petitioner herein is barred when the Circuit Court eliminates all contempt, including the punitive. *United States Ex Rel. West Virginia-Pittsburgh Coal Co. v. Bittner et al.*, 11 F. 2d 97 (1926).

Counsel for the Petitioner avers without supporting circumstances or parallel precedent that this cause is "novel and important." The extent of discovery under the new Federal Rules of Civil Procedure is of vital importance to society and economy, but it is not definitive in this cause. Counsel for the Petitioner makes no claim that the decision of this discovery question will determine the litigation and avoid further trial action. He cannot aver that the decision herein will affect a number of other cases and litigants. He is at best only concerned with his self-help in a minor procedural matter.

All of the factual queries of the Petitioner have been answered. He has been given the length and thickness and direction of the hawser—now he wants to "pick lint" among the work product of opposing counsel. The defendants in the litigation have themselves deposed, answered and produced with respect to every detail. Petitioner wants more; he attempts before trial to open opposing counsel's files to prove the latter's clients are untruthful. He decries "the sporting theory of justice", while himself pursuing every trick to confuse trial on the facts and merits.

Petitioner avers as usual that there is conflict between the various Circuit Courts. There is quotable dicta in *Hoffman v. Palmer*, 129 F. 2d 976 (C. C. A. 2) (1942), but the decision therein constitutes a denial of the importance of production of documentary evidence from an attorney's file. The Circuit Court asserts the desirability of free discovery, but does not reverse the District Court, although there was no production upon trial and no objection to production on the ground of privilege. The dicta in the *Hoffman* case to the effect that production on trial bears analogy to production before trial under Rule 26 (b) is not disputed herein.

WHEREFORE, it is respectfully submitted that there is no present punitive or final contempt order of the Courts below subject to appellate jurisdiction, that there is no reason of urgency or general importance or novelty which requires the invocation of the general discretionary power of this Court, and finally that there is no conflict between the decisions of lower Federal Courts necessary for resolution, and that the petition should be denied.

S. B. FORTENBAUGH, JR.,
B. F. STAHL, JR.,
SHIELDS, CLARK, BROWN & MCCOWAN,
Counsel for Respondents.